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Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission, Office of the Secretary

COMMENTS OF MONTEREY LICENSES, LLC

David D. Oxenford
Brendan Holland

Its Attorneys

DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W.
Suite 450
Washington, D.C. 20005
(202) 508-6600

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SUMMARY

By these comments, Monterey Licenses, LLC ("Monterey") reiterates the issues raised in its earlier Petition for Reconsideration of the Commission's decision in its *2003 Report and Order* to attribute radio joint sales agreements (JSAs) and to not permanently grandfather existing JSAs, even those necessary to maintain a competitive balance in a particular market. Nothing in the record of the Commission's earlier proceeding supports the attribution of JSAs, and the decision to attribute JSAs is entirely inconsistent with the Commission's earlier attribution proceeding. Even if the Commission decides upon further review that it properly determined that JSAs are attributable, the decision to not permanently grandfather existing JSAs, is arbitrary and capricious and manifestly unfair. The Commission has failed to offer a reasoned explanation for permanently grandfathering existing combinations of stations that exceed the local radio ownership rule's limits while at the same time requiring parties to unwind JSAs under the same circumstances. Like parties that acquired stations under the preexisting local ownership rules, parties that entered into JSAs prior to the Commission's adoption of the *2003 Report and Order* should not be penalized for their compliance with the FCC's attribution and local ownership rules that were in effect at the time the agreements were signed. In the event that the Commission finds support for making JSAs attributable, it should nonetheless permit joint sales agreements in situations where a JSA is necessary to achieve a competitive balance in a market. If such JSAs are not permitted, even on this limited basis, the Commission will exacerbate potentially anti-competitive situations that exist in many local markets.

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To: The Commission, Office of the Secretary

COMMENTS OF MONTEREY LICENSES, LLC

Monterey Licenses, LLC ("Monterey"), by its attorneys, hereby submits comments in response to the above-referenced Notice of Proposed Rule Making (the "NPRM").[1] In 2003, Monterey submitted a Petition for Reconsideration seeking reconsideration of the Commission's *Report and Order*, released July 2, 2003, which revised the Commission's broadcast ownership

1 *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rule Making, MB Docket 06-121 (June 21, 2006) ("NPRM").

rules.[2] By these comments, Monterey reiterates the issues it previously raised in its Petition for Reconsideration and asks that the Commission take these issues into consideration as it reassesses and reformulates its media ownership rules. Specifically, the Commission's 2003 decision to make radio Joint Sales Agreements ("JSAs") attributable was an arbitrary and capricious departure from earlier Commission precedent and was entirely unsupported by the record. Even if the attribution of JSAs could be found to be justified, the Commission's 2003 decision to not permanently grandfather existing JSAs, is unjustified and inequitable, and must be reversed in this proceeding. Finally, in the event that the Commission finds support for making JSAs attributable, it should nonetheless permit joint sales agreements in situations where a JSA is necessary to achieve a competitive balance in a market. Accordingly, Monterey respectfully requests that the Commission take these issues into account as it addresses the radio multiple ownership rules.

I. THE COMMISSION'S EARLIER DECISION TO MAKE JSAS ATTRIBUTABLE IS ARBITRARY AND CAPRICIOUS AS IT IS NOT SUPPORTED BY THE RECORD OR COMMISSION PRECEDENT.

In the *2003 R&O*, the Commission summarily concluded that "JSAs currently in existence will be attributable."[3] However, other than the Commission's bare assertion, there is no support for this conclusion in the earlier record or, for that matter, anywhere. Indeed, just two years prior to initiating the rule making proceeding that culminated in the *2003 R&O*, the Commission sought and received extensive comment on its attribution rules.[4] In the resulting

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2 *In the Matter of 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 13620 (Aug. 5, 2003) ("*2003 Report and Order*" or "*2003 R&O*").

3 *2003 R&O* at ¶ 324.

4 *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the*

Attribution Order, the Commission explicitly stated: "Accordingly, after weighing competition, *diversity, and administrative concerns, we decline to impose new rules attributing JSAs as long* as they deal primarily with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs."[5] Furthermore, the Commission declined to adopt general disclosure and reporting requirements for radio JSAs "in the absence of specific evidence of widespread abuse of JSAs by broadcasters."[6] Even the Commission's September 12, 2002 media ownership *NPRM* stated expressly: "We do not contemplate a change in the broadcast attribution rules, except to the extent that the single majority shareholder exemption is under consideration in the cable proceeding."[7] Despite the findings of the *Attribution Order* that were based on a comprehensive record and its disavowal of an intent to modify its attribution rules in the *NPRM*, the Commission inexplicably reversed itself in the *2003 R&O* by concluding that: "JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution" and "we find that JSAs may convey sufficient influence or control over advertising to be considered attributable."[8] While the Commission has the discretion to change its mind, it must explain why it is reasonable to do so.[9] Despite this requirement, the *2003 R&O* pointed to no "specific evidence of widespread abuse"

Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Report and Order, 14 FCC Rcd 12559 (1999) ("*Attribution Order*") at ¶ 122.

5 *Id.* at ¶ 123.

6 *Id.*

7 *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, Notice of Proposed Rule Making, 17 FCC Rcd 18503 (2002) (*"NPRM"*) at n.13.

8 *2003 R&O* at ¶ 322.

9 *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

and provides no explanation, save for the conclusory statements quoted above, to justify its new rule.

Such conclusory statements alone are insufficient to justify a change in the Commission's Rules. For example, in *Fox Television Stations, Inc. v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit remanded to the Commission a decision where it failed to adequately explain its departure from a previously held position.[10] In *Fox*, the court held that the Commission's decision to retain the national television ownership cap in 1998 without explanation as to why it was ignoring a prior conclusion in 1984 to eliminate the cap was arbitrary and capricious. The court noted: "So long as the reasoning of the 1984 Report stands unrebutted, the Commission has not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision."[11] Here, the Commission completely failed to point to any evidence justifying attributing JSAs or adequately explain why it is now rejecting the reasoned conclusion it reached in the *Attribution Order*.

It, however, is not at all surprising that the Commission is unable to explain its about-face because the facts do not warrant such a drastic change in position. As an initial matter, a JSA involves only the sale of advertising and has nothing to do with the provision of programming. Therefore, the concerns over loss of diversity and competition that potentially exist when a licensee contracts with another party to program its station – an LMA or TBA, for example – are not present here. As JSAs affect only advertisers, the DOJ, not the Commission, is the appropriate forum for review of competition rules in this area. Indeed, the Commission's decision to attribute JSAs because of their potential impact on competition in advertising markets runs completely counter to its statement in the *2003 R&O* that "our duty as an agency runs to

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10 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

11 *Fox* at 1045.

consumers, not advertisers."[12] The Commission also stated in the 2003 R&O that it "is not charged with protecting competition in the advertising markets" and noted that the "Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market."[13] The Commission's contention that JSAs are harmful because "JSAs put pricing and output decisions in the hands of a single firm. Instead of competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market"[14] seems to be exactly the type of harm which the Commission, in the *2003 R&O,* decided was outside its purview.

In addition, the Commission itself expressly acknowledges the lack of evidence regarding its purported need to attribute JSAs: "Nothing in the record indicates that licensees abdicate control over stations that are subject to JSAs."[15] Indeed, no commenter in the earlier rule making proceeding submitted evidence of any kind that so much as suggested that JSAs should be considered attributable. Of the five commenters in the 2003 proceeding the Commission cited to as being against JSAs in one way or another, three were represented by the same counsel and employ the *exact same language*, *see* Exhibit 1, and none of the comments provided a single iota of empirical evidence that supports attributing JSAs.[16] Thus, the Commission had *no* empirical support in the record when it determined that JSAs should be attributable, and no support for abandoning the contrary conclusion that the Commission reached only seven years ago. The Commission must address this shortcoming and reverse the earlier decision to make JSAs attributable.

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12 *Id.* at ¶ 68.

13 *Id.* at ¶ 339.

14 *Id.* at ¶ 319.

15 *Id.* at ¶ 318.

16 *Id.* at nn.702-03 and Exhibit 1.

Further illustrating the arbitrary nature of its decision to attribute JSAs is the Commission's own statement that "JSAs raise concerns regarding the ability of smaller broadcasters to compete."[17] This statement is entirely inconsistent with the Commission's conclusion in its attribution proceeding where the Commission expressly made the point that, JSAs "may actually help promote diversity by enabling smaller stations to stay on the air."[18] Indeed, it has been Monterey's experience that in markets where it has JSAs, the efficiencies generated by JSAs permit it to compete with much larger media conglomerates that own multiple stations in local markets while still retaining local control over programming.[19] The ability to enter into JSAs is essential to ensuring that smaller broadcasters are able to compete in today's media marketplace. In light of the public outcry against homogenization of programming and the Commission's apparent concern with localism, JSAs should be celebrated for permitting smaller broadcasters to compete with the huge media conglomerates without sacrificing editorial control over programming, and for permitting smaller companies, without the ability to buy more stations in a market, to aggregate enough advertising availabilities to compete with the most consolidated company in a market.

Contrary to the suggestion of the *2003 R&O*, the Commission's attribution precedent and policies in no way support finding JSAs attributable. As the Commission stated in the *Attribution Order*, "The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other

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17 *2003 R&O* at ¶ 319.

18 *Attribution Order* at ¶ 122.

19 *See* Section II, *infra*.

core operating functions."[20] Because the Commission has made no finding that JSAs result in influence or control over matters that involve programming or core operations, and has no record evidence on which to make such a finding, they are by definition not attributable interests. Furthermore, the "degree of influence" targeted by the attribution rules is not a degree of conjecture or a mere scintilla of possibility. Instead, "[t]he attribution rules are designed to attribute entities that wield *significant* influence on core operations of the licensee."[21] As the Commission's precedent demonstrates, control over programming decisions is the key factor in whether a particular interest in a station should be considered attributable. As JSAs confer no influence over programming decisions, let alone "significant influence," the Commission's decision to make JSAs attributable is arbitrary and capricious, and should be reversed.

II. PRINCIPLES OF FAIRNESS, THE PUBLIC INTEREST, AND ESTABLISHED COMMISSION PRECEDENT REQUIRE THE COMMISSION TO PERMANENTLY GRANDFATHER JSAS ENTERED INTO PRIOR TO THE ADOPTION OF THE *2003 R&O*.

Even if the Commission were to affirm that JSAs are attributable interests, the Commission's decision in the *2003 R&O* to "grandfather" non-compliant JSAs for only two years, is manifestly unfair and contrary to the public interest. In its earlier orders, the

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20 *Attribution Order* at ¶ 1 *citing Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984) *on recon.*, 58 RR 2d 604 (1985) *on further recon.*, 1 FCC Rcd 802 (1986) ("*1984 Attribution Order*"). *See Quincy D. Jones*, 11 FCC Rcd 2481 (1995) at ¶ 22 (describing the objective of the Commission's attribution rules as "to identify those interests in or relationships to an applicant which confer on its holders a degree of "influence" such that holders have 'a realistic potential to affect the programming decisions of licensees'" and quoting *1984 Attribution Order*).

21 *Attribution Order* at ¶ 46 (emphasis added). *Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy, Memorandum Opinion and Order*, 16 FCC Rcd 1097 (2001) ("*Attribution Reconsideration Order*") at ¶ 13 ("attribution extends to relationships that permit *significant* influence over the core operations of a licensee.") (emphasis added). On reconsideration, the Commission in rejecting a petitioner's argument that the Commission should look to three factors—"(1) participation in programming selection; (2) influence in hiring personnel who make programming or core management decisions; and (3) substantial control over the licensee's budget"— noted that "our rules address many of [petitioner's] concerns." *Id.* at ¶ 16.

Commission failed to offer a reasoned explanation for permanently grandfathering existing *combinations of stations that exceed the local radio ownership rule's limits while at the same* time requiring parties to unwind JSAs in the same circumstances. Like parties that acquired stations under the preexisting local ownership rules, parties that entered into JSAs prior to the Commission's adoption of the *2003 R&O* should not be penalized for their compliance with the FCC's attribution and local ownership rules that were in effect at the time the agreements were signed. In short, to hold that a contract entered into by two parties in full compliance with all then-existing FCC regulations is now invalid, while at the same time permanently grandfathering non-compliant ownership of stations – is fundamentally unjust. Grandfathering of existing ownership interests *and* JSAs not only would be the most fair solution, it would also be consistent with established Commission precedent.

The Commission's decision in the *2003 R&*O to grandfather existing ownership interests is but the most recent example of a longstanding and consistent policy to grandfather such interests. For example, when the Commission originally adopted its newspaper/broadcast cross-ownership ban, the Commission required divestitures only in the most "egregious" of cases, namely where the commonly owned newspaper and television combination constituted a monopoly in a given market.[22] At that time, the Commission also concluded that parties would

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22 *See Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to the Multiple Ownership* Standard, 50 FCC 2d 1046, 1078 (1975) *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775 (1978). *See also Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting,* Memorandum Opinion and Order, 25 FCC 2d 318 (1970) *aff'd sub nom. Mansfield TV,Inc. v. FCC,* 442 F.2d 470 (2d Cir. 1971); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order,* 3 RR 2d (P&F) 1554 (1964). When LMAs were deemed attributable in 1999, the Commission grandfathered existing LMAs until the conclusion of the 2004 Biennial Review. *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and* Order, 14 FCC Rcd 12903 (1999) at ¶ 133.

not be required to divest existing radio/television combinations were in effect prior to the adoption of new rules.[23] *Fundamental to these decisions was the Commission's understanding* that forced divestiture would result in adverse public interest consequences.

The Commission listed several similar reasons in the 2003 proceeding for permanently grandfathering existing station combinations. According to the Commission:

> As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules. Also, we also are sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. We also agree with the commenters that argue that compulsory divestiture would be too disruptive to the industry. On balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.[24]

The very same rationale, however, supports the grandfathering of existing JSAs. Parties to JSAs, like those that purchased stations, should not be penalized for their compliance with the rules that previously were in effect. Although the investments may not be equivalent to station ownership in terms of total dollars, these investments are nevertheless significant. Moreover, the investments were entered into based on the 1999 proclamation from the FCC that JSAs were <u>not</u> attributable interests. Such investments were made with the intent that they would be amortized over the full length of the JSA term – not some arbitrarily shorted two-year grandfathering period.

The Commission has provided no explanation as to why parties to JSAs should not be afforded "the opportunity to retain the value of their investments made in reliance on [the FCC's]

23 *Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to the Multiple Ownership* Standard, 50 FCC 2d 1046, 1078 (1975) at 1081-82, *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

24 *2003 R&O* at ¶ 484.

rules,"[25] just like the owners of noncompliant station groups. As the Supreme Court has stated, *"Elementary considerations of fairness dictate that individuals should have an opportunity to* know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[26] In the *2003 R&O*, the Commission failed to provide any factual support for its sudden decision to make JSAs attributable or for its failure to permanently grandfather JSAs. This complete lack of factual support alone is fatal to its rule, which should be reversed.

There is simply no reason for the Commission's decision to make JSAs attributable, and yet at the same time grandfathering existing group ownership. As noted above, JSAs, unlike actual ownership, affect only the sale of advertising time, and have nothing to do with decisions related to programming and other core operations of stations. Thus, JSAs, are unlike station ownership, LMAs, and other similar arrangements, as they do not raise diversity concerns regarding programming decisions that are the principal focus of the Commission regulations in this area. Consequently, they should not be considered attributable interests for purposes of local radio ownership. If the Commission nonetheless fails to reverse its unjustified decision to make JSA attributable, JSA attribution and grandfathering should at a minimum parallel that of grandfathered group ownership.

Moreover, requiring parties to unwind JSAs would place smaller station groups at a competitive disadvantage by hampering their ability to compete in local markets. The economic circumstances surrounding the JSAs to which Monterey is a party underscore why the Commission must permanently grandfather JSAs. Monterey has entered into JSAs as a means of competing with larger radio groups in its markets. Such sales agreements have permitted Monterey to negotiate for better sales packages to compete against the dominant group owner in

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25 *Id.*

26 *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

a market. Because Monterey can sell ad time on an additional station to advertisers in combination with its other stations, it can compete more effectively with the dominant station group for the limited advertising revenues available in the market. Thus, requiring divestiture of a JSA that allows a weaker group to compete more effectively simply is not in the public interest.[27]

The Commission itself has traditionally recognized the benefits of such arrangements for precisely these reasons, stating that JSAs "help promote diversity by enabling smaller stations to stay on the air."[28] Moreover, in the DTV context, the Commission said it "look[s] with favor upon joint business arrangements among broadcasters that would help facilitate the transition to digital technology. JSAs may be one such joint business arrangement."[29] Moreover, Congress has expressly noted the public interest benefits associated with JSAs and similar cooperative arrangements. Specifically, Congress commended the "positive contributions" of LMAs and also found "the efficiencies gained through these agreements have reaped substantial rewards for both competition and diversity..."[30] The same logic applies equally to JSAs. Should the Commission refuse to reconsider grandfathering JSAs, it will exacerbate the already anti-competitive situation in many markets.

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27 Certainly, at a minimum, the Commission should permanently grandfather pre-existing JSAs in those markets where necessary to maintain a competitive balance in the marketplace, such as the Fargo market, which is discussed further below.

28 *2003 R&O* at 122-23.

29 *Attribution Order* at ¶ 122.

30 S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 164 (1996) and H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 119 (1995).

The Commission's action also contravenes the rulemaking procedures of the Administrative Procedure Act, which prohibit an agency from applying rules retroactively.[31] As Justice Scalia has warned, agencies must be wary of "secondary retroactivity," namely, a rule having "exclusively future effect" that "affect[s] past transactions."[32] As Justice Scalia explained, "a rule that has unreasonable secondary retroactivity – for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule – may for that reason be 'arbitrary' or 'capricious,' *see* 5 U.S.C. § 706, and thus invalid."[33] This concern is exacerbated when a new regulation "replace[s] a prior agency interpretation."[34] Until recently, the Commission had no regulations governing, much less prohibiting, JSAs. While the Commission is not prohibited from enacting rules prospectively to new JSAs, for the Commission to apply its regulations *ex post facto* to JSAs that were in existence well before the adoption of the 2003 rules is impermissible.[35] The Commission cannot simply change its regulations and upset some existing business relationships, while leaving business relationships of competitors, that do not comply with exactly the same rules, in place.

In sum, parties that entered into JSAs relied on the lack of Commission regulation of such agreements and the Commission's decision in the *Attribution Order* declining to make them attributable. Therefore, the Commission's 2003 decision to make them attributable is unfair, unwise, and contrary to the public interest and established Commission precedent. There was no

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31 *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1525 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995). ("The FCC cannot abandon the legislative scheme because it thinks it has a better idea."); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987) ("both the express terms of the APA and the integrity of the rulemaking process demand that the corrected rule, like all other legislative rules, be prospective in effect only.")

32 *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring).

33 *Id.* at 220.

34 *Smiley v. Citibank*, 517 U.S. 735, 745 n.3 (1996).

35 *Id.*

support in the earlier record for the Commission to completely reverse course and needlessly interfere with established business relationships that relied on an existing regulatory scheme, and there continues to be no support for such an action today. This is particularly true given that JSAs have nothing to do with the Commission's diversity and competition goals for its rules. The Commission's actions have had an impermissible retroactive effect as parties attempt to comply with the Commission's rules. As shown above, the Commission has provided no justification for treating JSAs differently with respect to its failure to grandfather existing JSAs while at the same time grandfathering existing station groups. This failure to permanently grandfather JSAs will prohibit smaller broadcasters from competing with larger station group owners to the detriment of competition and the public interest.

III. IN THE EVENT THAT THE COMMISSION DECIDES TO MAKE JSAS ATTRIBUTABLE, IT SHOULD NEVERTHELESS PERMIT SUCH SALES AGREEMENTS IN SITUATIONS WHERE THE JSA IS NECESSARY TO ACHIEVE A COMPETITIVE MARKETPLACE.

In the event that the Commission finds support for making JSAs attributable, it should nonetheless adopt a rule permitting joint sales agreements in situations where a JSA is necessary to achieve a competitive balance in a particular market. For example, Monterey currently has a JSA with Guderian Broadcasting, Inc., the licensee of KEGK(FM), Wahpeton, North Dakota (formerly KGWB) ("Fargo JSA"), which has been in place since 2002. Pursuant to this sales agreement, Monterey has been purchasing advertising time on that station for resale in the Fargo, North Dakota-Moorhead, Minnesota market ("Fargo market"). Monterey itself holds several other licenses in the Fargo market, and under the radio multiple ownership rules that went into effect on September 3, 2004, Monterey would be forced to terminate the JSA or divest itself of another station in the Fargo market.[36] This divestiture would be required while, at the same time, a competing broadcast group in the market, which **owns** more stations than allowed under the current limits, is not forced to divest at all. Thus, to ensure a competitive marketplace, Monterey urges that even if the Commission decides to make JSAs attributable generally, that it permit joint sales agreements in particular markets, such as Fargo, in order to maintain the competitive balance to the benefit of the public interest.

In the Fargo market, a competing station owner, Clear Channel Communications ("Clear Channel"), currently controls seven of the market's eighteen operating commercial radio stations, including five FM stations.[37] Under the Commission's new ownership rules, Clear Channel would not be able to own five FM stations in a market unless that market had 45 or more stations.[38] Nevertheless, Clear Channel was permitted to acquire the fifth station under prior provisions of the rules, despite the objections of Monterey, and now is under no obligation to divest itself of such station. According to BIAfn, the Clear Channel stations account for approximately half of all of the estimated total market revenue.[39] In order to effectively compete with Clear Channel in the market, Monterey entered into the Fargo JSA in 2002, when it was perfectly permissible under the FCC's Rules. Indeed, the Fargo JSA was specifically approved

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36 Under the Commission's *2003 R&O,* this JSA was to be divested by September 3, 2006, however, on August 30, 2006, Monterey filed a Petition for Waiver, seeking a waiver of the divestiture requirement, which was granted by the Commission on September 1, 2006, pending the outcome of this proceeding.

37 Clear Channel Communications, Inc., the largest station owner in the Fargo market, has attributable interests in KVOX(AM), Moorhead, Minnesota, KFGO(AM), Fargo, North Dakota, KFAB(FM), Kindred, North Dakota, KKBX(FM), Fargo, North Dakota, WDAY-FM, Fargo, North Dakota, KRVI(FM), Detroit Lakes, Minnesota, and KDAM(FM), Hope, North Dakota.

38 *See* 47 C.F.R. § 73.3555(a)(3).

39 *See* BIAfn Media Access Pro 4.1, Market Revenue Share Report for Fargo-Moorhead, ND-MN, demonstrating that based on the most recent BIAfn market report Clear Channel has "only" 48.4% of the market's radio revenues.

by a 2003 Media Bureau decision.[40] The combined sales forces of Monterey's stations in the Fargo market, having the ability to sell advertising time on KEGK(FM), as well as on the stations owned by Monterey, have allowed Monterey to put together sales packages for advertisers that are equally as attractive in terms of audience reach as those put together by Clear Channel – as the JSA allows it to sell advertising on five FM stations, the same number owned by Clear Channel. In the same BIAfn data for 2005, Monterey's market share is shown as 42.2%, approximately 2.9% of which is attributable to KEGK(FM).[41]

On September 3, 2004, the Third Circuit permitted the new radio ownership rules, including the rule making radio JSAs attributable interests, to become effective.[42] The Commission's *2003 R&O* required that parties divest themselves of non-compliant JSAs within two years of the effective date of the new rules.[43] Thus, non-complaint JSAs were to be terminated by September 3, 2006. At the same time, however, the new rules do not require the divestiture of *ownership* combinations that are not in compliance with these rules. In fact, under the radio ownership rules a grandfathered cluster could be sold to a Qualified Entity, permitting the grandfathered cluster to remain intact following the sale. It is a fundamental principal of administrative law that similarly situated parties must be similarly treated.[44] It would be contrary to this fundamental tenant of Commission policy to prevent a smaller broadcaster in a market from entering into a JSA, while at the same time permitting Clear Channel to control seven

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40 *See Letter to Harry Martin, et al*, 18 FCC Rcd 1498 (Media Bureau, 2003).

41 *See* BIAfn Media Access Pro 4.1, Market Revenue Share Report for Fargo-Moorhead, ND-MN.

42 *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2004) (modifying the initial motion for stay of effective date of multiple ownership rules on rehearing). *See also*, Public Notice, "*Media Bureau Announces Requirement to File Certain Radio Joint Sales Agreements*," DA 04-4035, released January 3, 2005.

43 *2003 R&O* at 13746.

44 *See Melody Music., Inc. v. FCC*, 345 F. 2d 730, 733 (D.C. Cir. 1965).

stations in the market, including five FM stations, which cumulatively account for nearly 50% of the market's revenues. Simply put, it is patently unfair to permanently grandfather existing combinations of stations that exceed the local radio ownership rule's limits while at the same time requiring parties to unwind JSAs, when the combinations are similar and operate in the same markets.

As demonstrated by Monterey's experience in the Fargo market, permitting JSAs on at least a limited basis is essential for reducing a significant competitive disparity that would otherwise exist between a smaller broadcaster and the dominant station group in the market. To prevent such beneficial JSAs would be to lessen competition in such markets, to the detriment of the public interest. Accordingly, even if it decides to make JSAs attributable generally, the Commission should permit parties to enter into JSAs, or continue existing JSAs, such as that held by Monterey in the Fargo market, which achieve a competitive balance in a market. The result of permitting these market-balancing JSAs would be to enable a smaller broadcaster to compete more effectively with a larger station owner.

Significantly, such a policy would maintain the ownership and programming diversity in a market, as such agreements go only to sales and do not affect the licensee's ability to program or operate the station. Thus, permitting JSAs in limited circumstances is a narrowly tailored solution to ensure effective competition against a larger, dominant station group. Without this safety valve, the Commission will essentially be institutionalizing the existing dominant station group, as no other, smaller station owner will ever be able to amass the same number of stations held by the dominant group in the market under the new ownership rules.

The decision of the United States Court of Appeals for the Third Circuit in *Prometheus Radio Project, et al. v. Federal Communications Commission*, 373 F.3d 372 (3rd Cir. 2004) supports this approach, which takes the competitive reality of a market into account. In the Third Circuit decision, the court repeatedly faulted the Commission for refusing to utilize "actual-use data" or "actual market share" to inform its drawing of lines as to permissible and impermissible media combinations.[45] In the context of the local radio ownership caps, the court expressly noted that Commission "does not explain why it could not take actual market share into account when deriving the numerical limits," and that "the Commission's reliance on the fiction of equal-sized competitors, as opposed to measuring their actual competitive power, is even more suspect in the context of the local radio rule."[46] As a result, the court remanded the local radio numerical limits "for the Commission to develop numerical limits that are supported by a rational analysis."[47] The reality of the situation is that the without the requested relief of permitting JSAs on at least a limited basis where necessary to protect a competitive balance, the Commission's rules will have the unintended result of grandfathering certain owners into a market-dominant position. Such an outcome is contrary to the public interest as it would create a permanent competitive imbalance, such as in the Fargo market. Thus, the Commission should permit JSAs where necessary to achieve a competitive marketplace.

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45 *Prometheus Radio Project, et al. v. Federal Communications Commission*, 373 F.3d 372 (3rd Cir. 2004) at 408-09, 419-420 and 434.

46 *Id.* at 443-44.

47 *Id.*

CONCLUSION

For the reasons set forth above, the Commission should reconsider its earlier decision to make JSAs attributable and find that such interests do not raise the possibility of exercising undue influence over a station, and thus, are permissible. In the event that the Commission finds such agreements to be attributable interests, it should at the very least permanently grandfather pre-existing agreements, especially in those markets where the JSA is essential to maintaining the competitive balance in the market. Moreover, in the event that the Commission finds support for making JSAs attributable, it should nonetheless permit JSAs in those markets where necessary to ensure a competitive marketplace, and to balance the reach of a larger, dominant station owner in the market.

Respectfully submitted,

MONTEREY LICENSES, LLC

By: ______________________
David D. Oxenford
Brendan Holland

Its Attorneys

DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W.
Suite 450
Washington, D.C. 20005
(202) 508-6600

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EXHIBIT 1

In total, comments relied upon by the Commission to attribute JSAs consist of the following:

- "Indeed, and in light of the need for the Commission to take a more rigorous approach to ownership and other business relationships among stations, DBC [IWC}, [NABCo] recommends that the Commission adopt a similar regulatory approach to new and existing joint sales arrangements ("JSAs"). These arrangements to play a significant role in affecting the fairness and effectiveness of competition in a local market." Dick Broadcasting Comments in MM Docket No. 01-317 at 8.
- "Indeed, and in light of the need for the Commission to take a more rigorous approach to ownership and other business relationships among stations, IWC recommends that the Commission adopt a similar regulatory approach to new and existing joint sales arrangements ("JSAs"). These arrangements to play a significant role in affecting the fairness and effectiveness of competition in a local market." Idaho Wireless Comments in MM Docket No. 01-317 at 9.
- "Indeed, and in light of the need for the Commission to take a more rigorous approach to ownership and other business relationships among stations, NABCo recommends that the Commission adopt a similar regulatory approach to new and existing joint sales arrangements ("JSAs"). These arrangements to play a significant role in affecting the fairness and effectiveness of competition in a local market." North American Comments in MM Docket No. 01-317 at 17-18.
- "Local Marketing Agreements, Time Brokerage Agreements, and Joint Sales Agreements, are all just various form of a licensee apathetically trading away their community responsibilities in exchange for financial consideration, thus should be abolished entirely. These types of agreements, very popular in the early 1990's, have lost their appeal since larger broadcasters can easily purchase these facilities in a deregulated era instead of haggling with another party over station control issues, yet remain under what was then considered very conservative ownership limitations within a market." Hodson Comments in MM Docket No. 01-317 at 9.
- "The same is true for JSAs since they have same competitive impact as TBAs and LMAs in that they take the same revenue from the market." Eure Comments in MM Docket No. 01-317 at 2.